Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported

by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in

a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

§ 1919. Agreements between states and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may

provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

Public Law 280 ("PL-280"), 18 U.S.C. § 1162 & 28 U.S.C. § 1360, provides in relevant part:

> **§ 1360. State civil jurisdiction in actions to which Indians are parties**
>
> (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
>
> | *State of*: | *Indian country affected*: |
> |---|---|
> | Alaska | All Indian country within the State |
> | California | All Indian country within the State |
> | Minnesota | All Indian country within the State, except the Red Lake Reservation |
> | Nebraska | All Indian country within the State |
> | Oregon | All Indian country within the State, except the Warm Springs Reservation |
> | Wisconsin | All Indian country within the State |
>
> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate

proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

STATEMENT

In 2001, Mary Doe ("Petitioner") had her parental rights in Jane Doe ("Jane") terminated by order of the Lake County Superior Court ("Superior Court"). Later that year, Jane was formally adopted by Mr. and Mrs. D., also by order of the Superior Court. These orders became final judgments that were never appealed through the state appellate process. Jane is an Indian child, alleged to have been resident on the Elem reservation at the time these custody proceedings[1] commenced. This action was brought by Petitioner, as a collateral federal challenge to the rulings of the Superior Court. She alleges violations of the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901, et seq., the Fourteenth Amendment, 42 U.S.C. § 1983, and California's Welfare and Institutions Code, § 300 et seq. The decision below followed appeal of the District Court's

[1] In order to avoid confusion, the term "custody proceeding" is used as it is used in ICWA, 25 U.S.C. § 1903(1), to include proceedings for foster care placements, the termination of parental rights, preadoptive placements, and adoptive placements, without regard to whether the proceeding is "voluntary" or "involuntary." 25 U.S.C. § 1903 (1).

final judgment, dismissing only Petitioner's first cause of action, in which she claims that the Superior Court improperly infringed upon the exclusive jurisdiction of the Elem Indian Colony ("Tribe") by exercising its concurrent jurisdiction over Jane, in violation of 25 U.S.C. § 1911(a).[2]

Petitioner's remaining claims, if litigated by her successfully, would provide the same relief she would be entitled to if this Court overturned the judgment dismissing her first cause of action. Each cause of action alleged in the District Court complaint seeks "[a] declaration that the judgments entered by [the Superior Court] are null and void," and "[a]n order that Defendants be directed to return [Jane] to the custody of Plaintiff and/or the Elem Indian colony." Under the second through fourth causes of action, Petitioner seeks such a declaration for "failure to comply with [ICWA] and/or the California Welfare and Institutions Code. . . ." Accordingly, while there is substantial factual dispute between the parties regarding the merits of these pending claims (Pet. App. 91a-97a.)[3], it is clear that the plaintiff alleges separate and adequate bases for relief under both federal and state law that have not yet been fully litigated.

The Ninth Circuit characterized this case, insofar as it concerns the scope of the Superior Court's adjudicatory

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[2] Still pending before the District Court are Petitioner's three other causes of action, including the second cause of action which alleges that the Superior Court proceedings failed to adhere to various procedural requirements of ICWA, in violation of 25 U.S.C. § 1912. Claims brought under 25 U.S.C. § 1915 have also been dismissed, but were not the subject of the appeal, below.

[3] Even the allegation at the core of the question presented here, that Jane Doe was a resident of, or domiciled on, the Elem reservation when her custody proceedings commenced, is contested by the respondents and will be litigated in the District Court.

jurisdiction in the underlying child custody proceedings, as a "case of first impression for the federal courts" that required it to reconcile provisions of PL-280 and ICWA. (Pet. App. 3a, 34a.) California has more than 100 federally-recognized Indian tribes, many of which consist of a single nuclear family, an extended family, or a relatively small group of Native Americans that historically have not been able to offer a neutral forum for child custody proceedings, notwithstanding their political and social sophistication, and burgeoning economic power. (Pet. App. 52a); *see* S. Rep. No. 699 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2411-12; *Bryan v. Itasca County*, 426 U.S. 373, 379-80 (1976); 70 Fed. Reg. 71194-01 (Nov. 25, 2005). In Public Law 280 ("PL-280"), 18 U.S.C. § 1162 & 28 U.S.C. § 1360, and the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, Congress accommodated both the need for neutral fora to determine Indian child custody issues, and tribal interests in control over Indian child custody matters arising within Indian country,[4] by authorizing California's state courts to exercise concurrent adjudicatory jurisdiction while also permitting Indian tribes to petition the Secretary of the Interior for the reassumption of exclusive tribal jurisdiction in appropriate circumstances.[5]

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[4] "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151. This definition applies to questions of both criminal and civil jurisdiction. *DeCoteau v. District County Court*, 420 U.S. 425, 427, n.2 (1975).

[5] The Elem Indian Colony has never made an application to reassume exclusive tribal jurisdiction over Indian child custody proceedings arising on the Elem reservation. (Pet. App. 65a.) Moreover the Tribe, which should be most interested in the question presented, intervened in the underlying Superior Court proceeding but never

(Continued on following page)

(See Pet. App. 65a; 28 U.S.C. § 1360; 25 U.S.C. §§ 1901(5), 1903(1), 1911, 1918.) The Ninth Circuit's decision comports with the statutory language and accommodates these diverse interests.

A. Factual Background[6]

Petitioner is a member of the federally recognized Elem Indian Colony in Lake County, California. In April 1998, when her daughter Jane Doe ("Jane") was five, she began living with Petitioner's aunt and Petitioner's brother and his wife. (Pet. App. 72a.) Jane confided to her mother on June 8, 1999, that she had been sexually abused on several occasions by a minor male cousin. (Pet. App. 72a.) Petitioner called the County Department of Social Services ("DSS") the next day to request abuse services for her daughter. (Pet. App. 72a.) DSS removed Jane from her relatives' home and initiated a petition under section 300 of the California Welfare and Institutions Code ("WIC"), alleging that Petitioner inadequately protected and supervised Jane by failing to provide alternate living arrangements while Petitioner knew or should have known that Jane could be sexually abused. (Pet. App. 72a.) The Tribe intervened in Jane's Superior Court custody proceedings, but never sought to assert its own jurisdiction over the case. (Pet. App. 4a, 81a.) Petitioner also participated in these

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asserted a claim to exclusive jurisdiction on its own behalf. It is not a party to this case. (Pet. ii.)

[6] This petition arises from the respondents' motions to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim under Federal Rules of Civil Procedure, rules 12(b)(1) and 12(b)(6). (Pet. App. 72a.) The facts presented here, unless otherwise stated, are taken from the complaint.

proceedings, and was appointed legal counsel. (Pet. App. 73a.) Neither the Tribe, nor Petitioner, ever contested the Superior Court's exercise of concurrent jurisdiction over Jane's custody proceeding during its pendency in the state court system. (Pet. App. 81a.) The Superior Court terminated Petitioner's parental rights on February 16, 2001 (Pet. App. 4a), and subsequently approved the adoption by Mr. and Mrs. D on September 28, 2001. (Pet. App. 4a.)

B. Procedural History

Petitioner filed this action for declaratory and injunctive relief on July 18, 2002, a year and a half after her parental rights to Jane were terminated by the Superior Court. (Pet. App. 5a.) Mr. and Mrs. D., Jane's adoptive parents, intervened on September 27, 2002.[7] Among other claims, Petitioner challenged the Superior Court's jurisdiction over Jane's child custody proceedings. (Pet. App. 5a.) The District Court held that the *Rooker-Feldman* doctrine, which states that federal district courts lack subject matter jurisdiction over actions that "attempt to obtain direct review of the [state court's judicial] decision in the lower federal courts" (*ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-623 (1989)), did not bar it from exercising subject matter jurisdiction over Petitioner's complaint. (Pet. App. 79a-80a.) On the substantive question, the District Court held that the Superior Court properly exercised concurrent jurisdiction over Jane's custody proceeding and accordingly dismissed Petitioner's first cause of action. (Pet. App. 90a-91a.) This ruling was entered by the District Court

[7] A statute of limitations defense has been preserved in the answer filed by respondents Mr. and Mrs. D.

pursuant to Federal Rules of Civil Procedure, rule 54(b) to allow immediate review. (Opp. App. 1a.) The Ninth Circuit affirmed the District Court in both respects,[8] concluding while public policy may ultimately favor a transition from PL-280 jurisdiction to tribal jurisdiction over Indian child custody proceedings, "this is a judgment for Congress to make, not the courts." (Pet. App. 3a, 70a.)

REASONS FOR DENYING THE PETITION

The Ninth Circuit's decision below affirms the concurrent adjudicatory jurisdiction of PL-280 states over custody proceedings involving Indian children where tribal jurisdiction has not been invoked. This decision comports with this Court's decisions, existing practice within PL-280 states, and with the plain meaning and congressional intent of PL-280 and ICWA. It presents no challenge to tribal sovereignty or the authority of tribes to reassume exclusive jurisdiction over Indian child custody matters as contemplated by ICWA. Finally, adequate relief would be available to Petitioner if she is successful in litigating her remaining claims before the District Court.

[8] The Superior Court respondents have filed a conditional petition for certiorari in this Court in an effort to preserve their argument that the *Rooker-Feldman* doctrine barred the District Court from exercising jurisdiction in this case.

A. The Ninth Circuit's Decision Does Not Conflict With Existing Precedent

1. The Ninth Circuit's decision, "a case of first impression for the federal courts," is consistent with this Court's rulings in *Bryan v. Itasca County* and *California v. Cabazon*

The Ninth Circuit's ruling below appropriately acknowledged that this is a "case of first impression for the federal courts" (Pet. App. 3a, 34a). Under PL-280, Congress granted criminal and civil adjudicatory jurisdiction to California over all areas of Indian country within the State. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360. It has long been understood that PL-280's grant of civil adjudicatory jurisdiction includes jurisdiction over Indian child custody proceedings. (Pet. App. 27a-30a.) Petitioner argues, incorrectly, that the Ninth Circuit's ruling contravenes this Court's decisions in *Bryan v. Itasca County*, 426 U.S. 373 (1976) and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). However, these decisions principally concern 18 U.S.C. § 1162 and the distinction between civil/regulatory jurisdiction and criminal/prohibitory jurisdiction, and do not turn upon an interpretation of 28 U.S.C. § 1360's grant of civil adjudicatory jurisdiction, which is at issue in this case. Petitioner's analysis improperly merges these two prongs of PL-280 (Pet. 12), which the *Bryan* and *Cabazon* rulings, and the decision below, demonstrate are analytically distinct. *See Bryan*, 426 U.S. at 379-80; *Cabazon*, 480 U.S. at 207-08; (Pet. App. 34a-70a).

The Ninth Circuit decision explains that this Court's analyses in *Bryan* and *Cabazon* arose in a context very different from a child custody proceeding. (Pet. App. 47a.) In *Bryan* and *Cabazon*, the Court's references to "private legal disputes" and "private civil litigation" were an effort

to categorize a state's regulatory authority over taxation and gambling as outside the bounds of PL-280's grant of civil adjudicatory jurisdiction. (Pet. App. 47a.) Whereas taxation[9] and gambling statutes regulate the conduct of the public at large, child custody statutes address the rights or status of parents and children, and other private individuals. (Pet. App. 48.) The Ninth Circuit concluded that, "child dependency proceedings are more analogous to the 'private legal disputes' that fall under a state's Public Law 280 jurisdiction than to the regulatory regimes at issue in *Bryan* and *Cabazon*." (Pet. App. 49a.) Accordingly, there is no conflict between the decision below and this Court's rulings in *Bryan* and *Cabazon*.

2. The Ninth Circuit's decision accords with other PL-280 states' exercise of adjudicatory jurisdiction over Indian child custody proceedings

Petitioner contends that the decision below creates a split of authority between the Ninth Circuit on the one hand, and the states of Wisconsin and Iowa on the other. (Pet. 13-15.) This contention is incorrect; if this case were decided by either of these states, the outcome would likely be the same as in the decision below. To support the argument that the Ninth Circuit is in conflict with Wisconsin law, Petitioner relies exclusively on a distinguishable Wisconsin Attorney General's Opinion from 1981

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[9] In *Bryan*, the Court specifically noted that the state taxation of Indian tribes is a "special" area of Indian law with particular significance to tribal sovereignty. *Bryan*, *supra*, 426 U.S. at 378-79; *see also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 138 (1980) (characterizing the problem of state taxation of Indian tribes and their members as "intricate" and "vexing").

(OAG 60-81 ("OAG"), 70 Op. Atty. Gen. Wis. 237 (1981), 1981 WL 157271), but ignores a recent decision of the Wisconsin Supreme Court (*In re Burgess*, 665 N.W.2d 124 (Wis. 2003)). (Pet. 13-15; Pet. App. 50a-51a.)

In the opinion relied upon by Petitioner, the Wisconsin Attorney General concluded that PL-280 did not grant the Wisconsin courts concurrent jurisdiction over child custody proceedings involving Indian children who reside or are domiciled within reservation boundaries. 1981 WL 157271, *2. Although acknowledging this Court's reference in *Bryan* to PL-280 states having jurisdiction over civil cases involving private "status," the Wisconsin Attorney General's decision was rooted in the civil/regulatory versus criminal/regulatory analysis employed in *Bryan* and *Cabazon*, but not applicable here. *Id.* Moreover, the Wisconsin Attorney General found significance in the fact that Wisconsin tribes had already asserted their jurisdiction over Indian child custody matters, a circumstance not present here:

> It is my understanding that most tribes in Wisconsin have adopted procedures to handle some child custody proceedings under the ICWA as well as domestic relations matters not covered by the Act. It is therefore my opinion that the exercise of state regulatory jurisdiction over tribe members residing on a reservation where the tribe is exercising jurisdiction over child custody matters constitutes an impermissible infringement upon tribal sovereignty. If a tribe is not exercising such jurisdiction, it is unlikely that a court would find that state action infringes upon that tribe's sovereignty.

1981 WL 157271, *2. In contrast, this case involves a Tribe that failed to take any action to assert jurisdiction over

Jane's child custody and so the sovereignty considerations that informed the Wisconsin Attorney General are not present here.[10] Moreover, the Wisconsin Attorney General's approach to PL-280 adjudicatory jurisdiction was recently rejected by the Wisconsin Supreme Court in *In re Burgess*, a case involving the State of Wisconsin's petition for involuntary commitment of a convicted sex offender as a sexually violent person, a question the court concluded was a "status determination" within its PL-280 civil-adjudicatory jurisdiction. *In re Burgess*, 665 N.W.2d 124, 133 (Wis. 2003); (Pet. App. 50a-52a.) Like the Ninth Circuit below, the *Burgess* court did not apply a civil-regulatory criminal-prohibitory analysis to determine the State's adjudicatory jurisdiction over a private person's status. Wisconsin law is thus not in conflict with the Ninth Circuit's decision.

Petitioner's claim that a conflict exists between the Ninth Circuit and the Iowa Supreme Court's decision in *Dept. of Human Services v. Whitebreast*, 409 N.W.2d 460 (Iowa 1987) is also incorrect. (Pet. 15.) The *Whitebreast* decision did not involve a child custody proceeding of any kind, but instead a petition brought by the State for reimbursement for aid to dependent children and future child support. *Id.* at 460-61. The *Whitebreast* proceedings did not involve any consideration of an individual's "status" or a state court's PL-280 adjudicatory jurisdiction over questions of individual status. To the contrary, the court ruled that the State's actions fell outside its PL-280

[10] The Elem Tribe is not atypical. Our search of the Federal Register established that only one California tribe, the Washoe Tribe, has reassumed exclusive jurisdiction over child custody proceedings. 61 Fed. Reg. 1779 (Jan. 23, 1996).

jurisdiction because they had the character of a regulatory proceeding intended to financially benefit the State and "if not technically amounting to taxation, certainly [bore] a striking resemblance." *Id.* at 463-64.

Accordingly, there is no conflict between the Ninth Circuit and the States of Iowa and Wisconsin. The Ninth Circuit decision is in harmony with these States, and with the States of Washington[11] and Idaho.[12]

B. Significant Claims Remain to Be Litigated Below And, If Litigated Successfully, Would Provide Petitioner With Relief Under Other Provisions of ICWA or Under State Law

This petition arises from an appeal that concerns only the first of four causes of action alleged in District Court complaint. Petitioner's remaining claims are pending in the District Court on disputed facts. Most significantly, the allegation that Jane resided, or was domiciled, on the Elem reservation within the meaning of ICWA at the time she was removed from Petitioner's custody and placed under the jurisdiction of the Superior Court, is contested by Jane, Mr. and Mrs. D., and the Superior Court. Because the question of whether Jane was resident or domiciled on the Elem reservation is not resolved, it is possible that a decision of this Court on the merits would have no

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[11] *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 465 n. 1 (1979) (quoting Washington's 1963 law asserting PL-280 jurisdiction over "[d]omestic relations," "[a]doption proceedings," and "dependent children").

[12] *See State v. George*, 127 Idaho 693, 905 P.2d 626, 629 (1995) (quoting Idaho's 1963 law asserting PL-280 jurisdiction over "[d]ependent, neglected and abused children").

practical effect if Petitioner ultimately fails to establish Jane's domicile or residency on the reservation.

Moreover, because Petitioner seeks the same relief under the claims pending in the District Court as she does under the first cause of action that is the subject of this petition, it is also possible that a decision of this Court on the merits would become moot, and of no practical effect, if she were to prevail on a cause of action other than the first. For these reasons, the Court should not grant the petition.

C. The Ninth Circuit Correctly Decided That the Superior Court Had Jurisdiction Over the Underlying Child Custody Proceedings

The Ninth Circuit's conclusion that PL-280 and ICWA authorized the exercise of concurrent jurisdiction by the Superior Court over Jane's child custody proceeding not only conforms to the decisions of this Court, and with the law of other PL-280 states, but it also has the virtue of being correct. The Ninth Circuit began its analysis of the Superior Court's jurisdiction with § 1911 of ICWA, which provides:

> An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law.

25 U.S.C. § 1911(a). (Pet. App. 21a-23a.) Because it is clear that the "existing Federal law" provision in 1911(a) includes PL-280 (*see Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 n.16 (1989)), the Ninth Circuit

turned to the question of whether PL-280 vested the Superior Court with jurisdiction over Jane's child custody proceeding. (Pet. App. 25a.) The Ninth Circuit concluded that it did, reasoning that "[a]t the heart of the dependency proceedings is a dispute about the status of the child, a private individual. . . . In short, child dependency proceedings are more analogous to the 'private legal disputes' that fall under a state's Public Law 280 jurisdiction than to the regulatory regimes at issue in *Bryan* and *Cabazon*." (Pet. App. 48a-49a.)

The Ninth Circuit appears to have drawn the line precisely where Congress intended it to be drawn. In *Bryan*, this Court recognized commentary indicating that laws having to do with status were the types of laws that Congress envisioned would fall within a state's civil Public Law 280 jurisdiction:

> A fair reading of these two clauses suggests that Congress never intended "civil laws" to mean the entire array of state noncriminal laws, but rather that Congress intended "civil laws" to mean those laws which have to do with private rights and status. Therefore, "civil laws . . . of general application to private persons or private property" would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to tax, grant franchises, etc. These are not within the fair meaning of "private" laws.

426 U.S. at 384 n.10 (emphasis added) (quoting Daniel H. Israel & Thomas L. Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D. L.Rev. 267, 296 (1973)); (Pet. App. 49a-50a). This conclusion comports with the plain language of PL-280 and ICWA,

the intent of Congress and the contemporaneous understanding of the United States Department of the Interior's Bureau of Indian Affairs and the United States Department of Justice (Pet.App. 60a-61a), and the long-standing practice in this area within the legal community in California. (Pet. App. 66a-69a.)

CONCLUSION

For the reasons stated, the Court is requested to deny the petition for writ of certiorari.

DATED: January 27, 2006

Respectfully submitted,

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APPENDIX 1 – JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DISMISSING WITH PREJUDICE PLAINTIFF'S FIRST CLAIM OF RELIEF FILED JANUARY 23, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 02-3448 MHP

MARY DOE,

Plaintiffs,

v.

ARTHUR MANN in his Official Capacity, ROBERT L. CRONE, JR. in his Official Capacity, LAKE COUNTY SUPERIOR COURT JUVENILE DIVISION, MR. D., MRS. D., AND THE DEPARTMENT OF SOCIAL SERVICES of LAKE COUNTY,

Defendants.

JUDGMENT

This action, having come before this court, the Honorable Marilyn Hall Patel, United States District Judge, presiding, and an opinion having been filed dismissing with prejudice plaintiff Mary Doe's first claim for relief, IT IS ORDERED AND ADJUDGED that judgment in favor of defendants on plaintiff's first claim for relief is entered. That disposition being FINAL, and there being NO JUST REASON FOR DELAY, judgment shall be entered pursuant to Federal Rule of Civil Procedure 54(b).

IT IS SO ORDERED.
